



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NUMBER 350 OF 2011**

**NAZIR JINNAH.....PLAINTIFF**

**VERSUS**

**ZAHEER MERLAHI JHANDA.....1<sup>ST</sup> DEFENDANT**

**CO-OPERATIVE BANK OF KENYA LTD.....2<sup>ND</sup> DEFENDANT**

**MO SOUND ENTERTAINMENT LTD.....3<sup>RD</sup> DEFENDANT**

**R U L I N G**

This ruling relates to preliminary objection raised by the 2<sup>nd</sup> Defendant dated 19<sup>th</sup> and filed on 21<sup>st</sup> February, 2019. The 2<sup>nd</sup> defendant challenges the jurisdiction of this court to hear his matter on the ground that it is statute bared pursuant to Section 4(2) of the Limitation of Actions Act, Cap 22 Laws of Kenya. This is because the claim by the plaintiff against the 2<sup>nd</sup> defendant was introduced in the further amended plaint filed on 24<sup>th</sup> January, 2019 after the expiry of the statutory period of three years.

It is therefore the 2<sup>nd</sup> defendant's position that no valid action or claim could be brought against it in matters in issue, unless allowed by the court under Section 27 of the same Act. The preliminary objection is supported by both the 1<sup>st</sup> defendant and the interested party herein. The plaintiff filed grounds of opposition to counter the preliminary objection.

Counsel have addressed the court on the preliminary objection and cited some authorities. It is true that the 2<sup>nd</sup> Defendant was included in these proceedings in the further amended plaint aforesaid. Going by the pleadings, it would appear that the plaintiff's claim against the 2<sup>nd</sup> defendant is based on negligence. Prima facie, therefore, the said claim should have been brought within three years from the date the cause of action accrued.

At face value, this is the true legal position. However, a reading of paragraphs 10, 11 and 13 of the further amended plaint read alongside prayers 2b and 3b, points to more issues beyond negligence. Illegality has been pleaded alongside possession of proceeds obtained from the illegal sale of the motor vehicle which is at the centre of the dispute.

A preliminary objection, if upheld, should be in the position to dispose of the entire suit before a full hearing. This is because examples include objection to the jurisdiction of the court, or a plea of limitation as in the present case, or a submission that the parties are bound by the contract giving rise to suit, and subject to reference to arbitration. See **Mukhisa Biscuits Manufacturing Company Ltd Vs West End Distributors Ltd (1969) EA 696**.

If I were to uphold the preliminary objection raised by the 2<sup>nd</sup> defendant, several issues will remain undetermined thereby driving the plaintiff out of the seat of justice before he is heard. I say so because, a reading from the pleadings, which include the 1<sup>st</sup> amended plaint filed on 16<sup>th</sup> July, 2013 introducing the interested party, shows that the plaintiff's case against the said interested party and now the 2<sup>nd</sup> defendant, is so intertwined that a full hearing is called for to determine the issues in question.

It is my considered view that the preliminary objection lacks merit and is therefore dismissed. The 2<sup>nd</sup> defendant shall however, reserve the option to include the said issue in the main trial during the prosecution of the suit. The costs shall be in the cause.

***Dated, signed and delivered at Nairobi this 19<sup>th</sup> day of December, 2019.***

**A. MBOGHOLI MSAGHA**

**JUDGE**